Supreme Court, U.S.
FILED

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No. 02 1250 FEB 10 2003

In The
Supreme Court of the United States

HEALTHGRADES.COM, INC.,

Petitioner,

v.

NORTHWEST HEALTHCARE ALLIANCE, INC.
d/b/a ASSURED HOME HEALTH & HOSPICE,

Respondent.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does publication and maintenance of an internet web site, which ranks entities in all fifty States according to U.S. government data, subject a defendant to jurisdiction in all States?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Healthgrades.com, Inc., n/k/a Health Grades, Inc. ("Healthgrades"), the petitioner and Northwest Healthcare Alliance, Inc. d/b/a Assured Home Health & Hospice ("Assured"), the respondent.

CORPORATE DISCLOSURE STATEMENT

Healthgrades has no parent corporation and there are no publicly held companies owning 10% or more of Healthgrades stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Healthgrades, respectfully requests that a writ of certiorari be issued to review the order and judgment of the Ninth Circuit Court of Appeals, and thus reinstating the decision of the United States District Court for the Western District of Colorado, which had dismissed the complaint against Healthgrades for lack of personal jurisdiction.

OPINIONS BELOW

The order of the Ninth Circuit Court of Appeals in Appendix A (App. A). The judgment of the United States District Court for the Western District of Washington is contained in Appendix B (App. B).

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on October 7, 2002, and petitioners' motion for rehearing was denied on November 15, 2002.

The District Court had jurisdiction in this matter pursuant to 28 U.S.C. § 1332(a). The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this petition are:

The petitioner's right to due process under Section 1 of the Fourteenth Amendment to the United States Constitution, which provides as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Background of Material Facts

Healthgrades is a Colorado-based company which publishes an internet web site. The web site reported the results of federal government reports as to healthcare providers throughout the United States, in order to make information regarding such providers available to consumers. Healthgrades collected data from the U.S. government in the form of complaints and violations by healthcare providers, and made these results available to consumers by providing a "rating" of each provider's results. App. 6-7. The ratings were obtained solely from the results of the data reported to the government, as evaluated and weighed according to Healthgrades' criteria. App. 7. The

ratings were not directed at any particular area of the country, but users could organize results according to area of the country or a particular zip code. *Id.* Healthgrades' ratings are not based on visits to any of the providers or data collected from the providers, but instead are based solely on data collected by Healthgrades at its headquarters in Colorado, from federal government data. *Id.*

No commercial transactions were offered or conducted through the web site. *Id.* Any visitor to the site must agree to a "User Agreement" which requires that any action to enforce the agreement must be brought in courts in Colorado. App. 8.

The only person alleged to have viewed the web site in the State of Washington is Assured's president, Richard Block. App. 9. Mr. Block was upset that Assured had received an "average" rating while a competitor had been rated "superior." *Id.* Assured, and Mr. Block, contend that any effort to rate healthcare providers according to government data is improper, because no entity is capable of making "qualitatively relative pronouncements about healthcare providers," and that more information regarding Assured should have been provided. App. 9.

B. The Proceedings Below

Assured filed an action against Healthgrades in Washington State Court, alleging a violation of the Washington Consumer Protection Act and Defamation. Healthgrades removed the action to federal court, and moved to dismiss the action for lack of personal jurisdiction. App. 10. The District Court granted Healthgrades' motion and found that Healthgrades did not have sufficient contacts with Washington to permit the exercise of jurisdiction over

Healthgrades there. However, the Ninth Circuit Court of Appeals reversed, holding that Healthgrades' publication of ratings which included Washington providers was sufficient to justify jurisdiction over Healthgrades in Washington.

REASON FOR GRANTING THE WRIT

THE MAINTENANCE OF A WEB SITE WHICH PROVIDES DATA AND OPINIONS PERTAINING TO ENTITIES IN ALL 50 STATES CANNOT BE CONSTRUED AS CONDUCT JUSTIFYING PERSONAL JURISDICTION OVER A DEFENDANT IN ANY PARTICULAR STATE.

This matter presents a crucial constitutional question regarding the Due Process rights of persons which maintain internet web sites, and specifically whether maintenance of such web sites will subject the person to lawsuits throughout the country. In this case, Healthgrades maintains a web site which discusses healthcare providers according to Healthgrades' interpretation of U.S. government data. The Ninth Circuit Court of Appeals erred by holding that the expression of such opinions justifies the exercise of personal jurisdiction in any particular State. The decision below contradicts the decisions of other Courts of Appeal, and potentially subjects those who communicate opinions over the internet to the unconstitutional burden of being subject to suit in any forum, until such time as this Court corrects the injustice.

ARGUMENT

I.

The "effects test" doctrine of *Calder v. Jones*, 465 U.S. 783 (1984), cannot be applied to create personal jurisdiction based on the maintenance of an internet web site which has uniform, nationwide application.

In its decision, the Ninth Circuit Court of Appeals held that personal jurisdiction could be asserted against Healthgrades pursuant to the "effects test" of this Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984). In so doing, the Ninth Circuit rejected the minimum contacts analysis of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997), which is typically applied by federal courts, including the Ninth Circuit (*see Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997)), in cases alleging creation of minimum contacts through publication over the internet. Rather, in the context of "tort cases," the court below announced that jurisdiction can be asserted according to the "effects test" of *Calder v. Jones*, 465 U.S. 783, 788 (1984). App. 4. The Ninth Circuit concluded that jurisdiction could be asserted under the "effects test" in this case, contending that Healthgrades:

> has purposely interjected itself into the Washington state home health care market through its intentional act of offering ratings of Washington medical service providers. This act was expressly aimed at plaintiff's forum state, since defendant was well aware that its ratings of Washington home health care providers would be of value primarily to Washington consumers.

App. 4-5.

The Ninth Circuit's opinion is fundamentally flawed in its conclusion that Healthgrades' actions were "expressly aimed" at Washington, merely based on the premises that Healthgrades had included ratings of Washington healthcare providers in its listings, and was "well aware" that the Washington listings would be most interesting to Washington consumers. In *Calder v. Jones*, 465 U.S. 783, 788 (1984) this Court was careful to stress that publication of facts regarding a resident of the forum State can only justify jurisdiction if the publication is "expressly aimed" at that particular State. This Court emphasized that the California plaintiff was "the focus of the activities of the defendants out of which the suit arises." *Id.*, 465 U.S. at 788. This court also emphasized that the "focal point" of the defendant's activities was in a particular State:

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered.

Id., 465 U.S. at 788-89 (footnote omitted). Thus, *Calder's* "effects test" "was adopted 'for determining *purposeful availment* in the context of defamation cases.'" *United States v. Swiss American Bank, Ltd.*, 274 F.3d 610, 623 (1st Cir. 2001). Thus, mere "awareness" of a particular state is insufficient; the defendant's allegedly tortious actions must have been specifically directed to that state.

Other federal courts have consistently followed this reasoning in cases alleging publication over the internet, and have rejected personal jurisdiction when, as here, the publication is not specifically aimed at any particular state. For example, in *Revell v. Lidov*, __ F.3d __, 2002 WL 31890992 (5th Cir. Dec. 31, 2002), the Fifth Circuit Court of Appeals rejected an attempt to impose personal jurisdiction arising over an article appearing on the internet, alleging a conspiracy among several members of the Reagan Administration. *Id.*, p. 3. The Plaintiff, Revell, sued in Texas, claiming that the Defendant "must have known that the harm of the article would hit home wherever Revell resided." However, the Fifth Circuit rejected the assertion of jurisdiction, because the article was not "expressly aimed" at Texas. *Id.*, p. 5.

> First, the article written by Lidov about Revell contains no reference to Texas, nor does it refer to the Texas activities of Revell, and it was not directed at Texas readers as distinguished from readers in other states. Texas was not the focal point of the article or the harm suffered, unlike *Calder*, in which the article contained descriptions of the California activities of the plaintiff, drew upon California sources, and found its largest audience in California.

Id., p. 5. The Fifth Circuit pointed out that its decision was consistent with previous decisions of the Sixth and Third Circuits in *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir. 1994), *cert. den.*, 513 U.S. 962 (1994) (story regarding Ohio plaintiff did not create jurisdiction in Ohio, where "focal point" was urine sample taken in Monaco and analyzed in Paris); and *Remick v. Manfredy*, 238 F.3d 248 (3rd Cir. 2001) (letters distributed to the entire "boxing community" regarding

Pennsylvania plaintiff did not create jurisdiction in Pennsylvania, since there was nothing indicating that letters were particularly targeted to Pennsylvania residents).

Similarly, in *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), the Fourth Circuit Court of Appeals rejected the assertion of personal jurisdiction based on an article on the housing of Virginia prisoners in Connecticut. The plaintiff, a prison warden in Virginia, contended that the article defamed him and in so doing the defendants knew (and expressly referred to) the fact that he lived in Virginia. The Fourth Circuit rejected that argument, holding that the defendants "did not manifest an intent to aim their web sites or the posted articles at a Virginia audience," and that jurisdiction would be proper only if the defendants "through the internet postings, manifest an intent to *target* and *focus* on Virginia readers." *Id.*, 315 F.3d at 259, 263 (emphasis in original). *See also ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002) (provider of internet service did not submit to jurisdiction in Maryland, because it "did not select or knowingly transmit infringing photographs specifically to Maryland with the intent of engaging in business or any other transaction in Maryland").

Assured's assertion of personal jurisdiction here is also equivalent to the claim of personal jurisdiction rejected by the Second Circuit in *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2nd Cir. 1997). In *Bensusan*, the "Blue Note" jazz club asserted that the defendant was subject to personal jurisdiction in New York, because the defendant had posted a web site using the name "Blue Note," and allegedly infringing on the New York club's trademark. It was clear that, as stated by the Ninth Circuit in this case, the defendant "was well aware" that

its web site may cause injury in New York, and in fact the web page included a disclaimer specifically referring to the New York club. *Bensusan Restaurant Corp. v. King*, 937 F.Supp. 295 (S.D.N.Y. 1996). Unlike the Ninth Circuit, however, the Second Circuit concluded that such "awareness" was not sufficient to create jurisdiction in New York because the defendant's actions all took place is Missouri. *Bensusan*, 126 F.3d at 28. The Second Circuit cited with approval to the reasoning of the District Court, which had explained that the defendant "has done nothing to purposefully avail himself of the benefits of New York. King, like numerous others, simply created a web site and permitted anyone who could find it to access it. . . . Bensusan's argument that King should have foreseen that users could access the site in New York and be confused as to the relationship of the two Blue Note clubs is insufficient to satisfy due process." *Bensuan*, 937 F.Supp. at 302; *Bensusan*, 126 F.3d at 26.

Calder, and the previous circuit cases following it, clearly do not allow the exercise of jurisdiction based on publication on internet web sites in the manner at issue here. Healthgrades' ratings did not concentrate on healthcare providers in any particular State. Instead, Healthgrades provided ratings based on government data for healthcare providers nationwide. Further, Healthgrades' ratings were not based on any visit to, or particularized study of, any specific healthcare provider. Such ratings were rather a result of publicly-available, U.S. government data, which Healthgrades evaluated according to the same formula which it applies equally to healthcare providers nationwide. Even if Healthgrades' program of extracting ratings from such data is tortious, as Assured contends, it is not a tort which is expressly aimed at Washington, or

any other particular state. As correctly found by the District Court, "[t]he record before the court is devoid of any evidence of an intentional act expressly aimed at a Washington resident. On the contrary, it is undisputed that Healthgrades' site is simply made available to anyone with an internet connection. Unlike the defendant in *Panavision [v. Toppen*, 141 F.3d 1316 (9th Cir. 1998)], Healthgrades did not select a particular entity as a target for its intentional tort (assuming, without deciding, that a tort was committed in this case)." App. 15. Accordingly, the assertion of personal jurisdiction under the Ninth Circuit's theory violates due process, and should not have been permitted.

II.

Personal jurisdiction also could not have been asserted under the "sliding scale" approach, which is traditionally applied to claims that internet postings create minimum contacts.

Assertions that postings on the internet create personal jurisdiction in a particular jurisdiction are traditionally evaluated according to the "sliding scale" analysis set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1123-24 (W.D. Pa. 1998). *See, e.g., Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir, 1997); *Mink v. AAAA Development LLC*, 190 F.3d 333, 336 (5th Cir. 1999); *Soma Medical International v. Standard Chartered Bank*, 196 F.3d 1292, 1298 (10th Cir. 1999). The Ninth Circuit Court of Appeals did not apply this analysis in the case below, electing instead to consider only the "effects test" of *Calder*. However, the "sliding scale" analysis also demonstrates that imposition of jurisdiction was inappropriate here.

Personal jurisdiction is inappropriate under the "sliding scale" approach when the defendant maintains "[a] passive web site that does little more than make information available to those interested in it." *Zippo*, 952 F.Supp. at 1123-24. The assertion of jurisdiction is appropriate when "a defendant clearly does business over the internet," through "knowing and repeated transmission of computer files over the internet." *Id.* The "middle category" consists of "interactive web sites where a user can exchange information with the host computer." *Id.* Such "interactivity" which can create jurisdiction, however, requires that the defendant offers products or services for sale to forum state residents (which can create jurisdiction). *Cybersell*, 130 F.3d at 417. *See also Millennium Enterprises, Inc. v. Millennium Music, LP*, 33 F.Supp.2d 907, 923 (D. Ore. 1999) ("[a] passive web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction").

Here, as properly found by the District Court, Healthgrades' site was merely a "one way street" which allows users anywhere in the country "to access the information it has collected but does not allow the visitor and the host to exchange pertinent information." App. 13. Because the Healthgrades web site did not involve "any commercial transactions, either proposed or consummated on the site," Healthgrades site was essentially passive. *Id.* Hence, "there is no merit to Assured's contention that the web site at issue is interactive and commercial in nature." *Id.*

CONCLUSION

For the reasons stated above, the petitioner requests that his petition for writ of certiorari be granted and that this Court review the decisions of the Ninth Circuit Court of Appeals.

Dated this 10th day of February, 2003.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHWEST HEALTHCARE ALLIANCE INC., a Washington corporation dba Assured Home Health & Hospice, Plaintiff-Appellant, v. HEALTHGRADES.COM, INC., a Delaware corporation, Defendant-Appellee.	No. 01-35648 D.C. No. CV-01-00488-BJR MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, Chief Judge, Presiding

Argued and Submitted July 12, 2002
Seattle, Washington

(Filed Oct. 7, 2002)

Before: HALL, TASHIMA and RAWLINSON, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

BACKGROUND

Plaintiff Northwest Healthcare Alliance, Inc., dba Assured Home Health & Hospice ("Assured"), is a home health care provider in Washington state. Defendant Healthgrades.com ("Healthgrades.com") is a Delaware corporation with its principal place of business in Colorado. Defendant operates a web site that purports to rate home health care providers, one of which is plaintiff. Plaintiff brought this action against defendant in Washington state court alleging defamation and violation of Washington's Consumer Protection Act after plaintiff learned it had received what it considered an unfavorable rating on defendant's web site. Defendant removed the action to the district court for the Western District of Washington based on diversity jurisdiction, then moved to dismiss the suit for lack of personal jurisdiction. The district court, finding that defendant's web site was merely a passive provider of information, that defendant had not purposely availed itself of plaintiff's forum, and that defendant had not committed any intentional acts expressly aimed at the forum state, granted defendant's motion. Plaintiff appeals. Because the parties are familiar with the facts of the case, we recount them here only to the extent necessary to explain our ruling.

DISCUSSION

The exercise of personal jurisdiction over an out-of-state defendant must comport with constitutional due process. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 471-72 (1985). The exercise of personal jurisdiction over an out-of-state defendant comports with due process when the out-of-state defendant maintains "certain minimum contacts with [the forum state] such that maintenance of

the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 310, 315 (1945) (citations omitted). When an exercise of personal jurisdiction is challenged, the burden is on plaintiff to demonstrate why the exercise of jurisdiction is proper. *Doe v. Unocal Corp.,* 248 F.3d 915, 922 (9th Cir. 2001). Plaintiff can satisfy this burden by showing that: 1) the defendant purposefully availed itself of the privilege of conducting activities in the forum state invoking the benefits and protections of the forum state's laws; 2) the plaintiff's claim arises out of the defendant's forum-related activities; and 3) the exercise of jurisdiction over the out-of-state defendant is reasonable. *Ballard v. Savage,* 65 F.3d 1495, 1498 (9th Cir. 1995).

Because most Internet activity occurs in cyberspace, the Internet presents special considerations in personal jurisdictional analysis, and the law in this area can fairly be described as in its infancy. *See, e.g., Panavision Int'l L.P. v. Toeppen,* 141 F.3d 1316, 1320 (9th Cir. 1998), *quoting Zippo Mfg. Co. v. Zippo Dot Com., Inc.,* 952 F.Supp. 1119, 1123 (W.D.Pa.1997) (internal quotation marks omitted) ("[w]ith this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages"). Indeed, before 1997, the Ninth Circuit "ha[d] not yet considered when personal jurisdiction may be exercised in the context of cyberspace." *Cybersell, Inc. v. Cybersell, Inc.,* 130 F.3d 414, 417 (9th Cir. 1997).

Thus far the Ninth Circuit has endorsed two tests for determining whether an out-of-state web site operator's activities amount to purposeful availment of the forum state rendering the exercise of personal jurisdiction over

the out-of-state web site operator constitutionally permissible: 1) the sliding scale approach, as articulated in *Cybersell,* 130 F.3d at 417-19; and 2) the effects test, endorsed by the Supreme Court in *Calder v. Jones,* 456 U.S. 783, 788-89 (1984), and adopted by the Ninth Circuit in *Panavision,* 141 F.3d at 1321-22.

The effects test is employed when the harm allegedly suffered by plaintiff sounds in tort. *See Panavision,* 141 F.3d at 1321 ("[i]n tort cases, jurisdiction may attach if the defendant's conduct is aimed at or has an effect in the forum state"). *See also Calder,* 465 U.S. at 788-89 (establishing an "effects test" for intentional action aimed at the forum state). Under this approach, the exercise of personal jurisdiction over an out-of-state defendant is proper if the defendant: 1) engaged in intentional actions; 2) expressly aimed at the forum state; 3) causing harm, the brunt of which is suffered – and which the defendant knows is likely to be suffered – in the forum state. *Panavision,* 141 F.3d at 1321, *quoting Core-Vent Corp. v. Nobel Industries AB,* 11 F.3d 1482, 1486 (9th Cir. 1993).

Plaintiff, alleging defamation and violation of Washington's Consumer Protection Act, is suing in tort, and application of the effects test to the facts of this case yields a constitutional exercise of personal jurisdiction by the district court for the Western District of Washington.

Specifically, we find that defendant Healthgrades.com has purposefully interjected itself into the Washington state home health care market through its intentional act of offering ratings of Washington medical service providers. This act was expressly aimed at plaintiff's forum state, since defendant was well aware that its ratings of Washington home health care providers would be of value

primarily to Washington consumers. Though defendant gleaned its information from various public sources, including the federal government, the information was obtained originally from Washington sources, and the allegedly defamatory rating received by plaintiff on defendant's web site concerned the Washington activities of a Washington resident. Finally, the brunt of the harm allegedly suffered by plaintiff occurred in Washington – where plaintiff is incorporated, where plaintiff has its principal place of business, and where plaintiff's reputation is likely to suffer if in fact it has been injured by defendant's actions. The effects, therefore, of defendant's out-of-state conduct were felt in Washington, plaintiff's claims arise from that out-of-state conduct, and defendant could reasonably expect to be called to account for its conduct in the forum where it understood the effects of its actions would be felt.

CONCLUSION

For the foregoing reasons, we find that the exercise of personal jurisdiction by the district court for the Western District of Washington is constitutionally permissible. The court's order granting defendant's motion to dismiss for lack of personal jurisdiction is hereby reversed, and the case is remanded for further proceedings.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST HEALTH-CARE ALLIANCE, INC., d/b/a ASSURED HOME HEALTH & HOSPICE, a Washington corporation, Plaintiff, v. HEALTHGRADES.COM, INC., a Delaware corporation, Defendant.	NO. C01-488R ORDER GRANTING DEFENDANT'S MOTION TO DISMISS (Filed Jun. 13, 2001)

THIS MATTER comes before the court on defendant Healthgrades.com, Inc.'s (hereinafter "Healthgrades") motion to dismiss this case for lack of personal jurisdiction. Plaintiff Northwest Healthcare Alliance, Inc. (d/b/a Assured Home Health & Hospice (hereinafter "Assured") opposes Healthgrades' request. Having now reviewed the pleadings filed in support of and in opposition to this motion, together with the relevant portions of the record, and being fully advised, the court finds and rules as follows.

I. BACKGROUND

Plaintiff Assured is a Washington corporation, headquartered in Woodinville, that is engaged in the business of providing home health care and home hospice services in various Washington counties. Defendant Healthgrades is a Delaware corporation with its principal place of business located in Lakewood, Colorado. Healthgrades has

developed an internet site on which it makes available profiles and reviews of medical service providers across the country. These profiles and reviews involve "grading" the medical providers based on data collected by the federal government and various independent entities, and interpreted according to certain scoring protocols and proprietary algorithms Healthgrades has derived. Healthgrades' subjective ratings of any given medical service provider are not based on visits with or information collected from those providers, but are based solely on information collected and available in the public record.

Healthgrades' ratings are available to anyone who accesses the website www.healthgrades.com, and are provided free of charge. In fact, there are no commercial transactions offered or conducted by Healthgrades through its website, although visitors to the site can click through to the pages of unrelated third parties, some of which may be commercial in nature. Healthgrades does not specifically direct any of the information it makes available to any particular state or area of the country but, rather, makes its information available to any person who has the capacity to point her browser to the Healthgrades home page. Once a visitor has arrived at the site, and makes a request to see reviews of a particular class of health service providers, the visitor is asked to select an area of the country or a particular zip code. The results requested by a particular visitor can then be tailored to address providers in a particular city, or by searching for particular providers by name.

Before any results are displayed on the Healthgrades website, the visitor or site user must accept a "User Agreement" that governs the terms and conditions of using the site. The User Agreement informs the visitor that she

will be provided "with a personal, revocable . . . license to use the site, conditioned on [the visitor's] continued compliance with the terms and conditions of" the User Agreement. *See* Healthgrades User Agreement at ¶1, Declaration of Samuel Ventola, Att. 2 to Exh. B. The User Agreement further informs the visitor that the information compiled on the website was generated and submitted by the federal government and certain independent information providers, and that Healthgrades "makes no representation with respect to, nor does it guarantee or endorse the accuracy, completeness, timeliness [or] reliability . . . of such" independently collected information. *Id.* at ¶11. Healthgrades expressly informs the visitor that the

> site is provided 'as is,' without warranty of any kind, either express or implied, including without limitation: (1) any warranties concerning the availability, accuracy or content of the information, products, services or results. . . . [and that Healthgrades] does not warrant or represent that (a) the site contains all relevant data, or (b) the information on the site or in the databases is accurate and complete.

Id. at ¶18. (uniform capitalization in original document modified). Most importantly, the User Agreement states that "[a]ny action to enforce this agreement will be brought in the federal or state courts presiding in Denver, Colorado U.S.A. and both [the visitor and Healthgrades] expressly agree to be subject to the jurisdiction of such courts." *Id.* at ¶21. Finally, the visitor must "represent that [she] ha[s] read the Agreement, understand[s] its terms, and agree[s] and intend[s] to be legally bound by it." *Id.* at ¶22. To represent such assent, and in order to view any proprietary information Healthgrades makes

available, the visitor must check a box labeled "I agree" and then ask to proceed to view the compiled information.

It appears that Assured's president, Richard Block, discovered Healthgrades' website while engaged in personal "web surfing." *See* Block Dec. in Opposition to Motion to Dismiss at ¶10. Being curious about the information that might be available with respect to his company, Block searched for information on Assured in Healthgrades' databases. Before receiving such information, Block was required to and did agree to the terms and conditions laid out in the User Agreement. Although Block now claims that he "did not pay particular attention to the terms and conditions that were referenced" in the User Agreement, *id.* at ¶14, he nowhere disputes the fact that he did indicate that he had read and understood the User Agreement, and affirmatively represented his assent thereto before being granted access to Healthgrades' scoring information.

Healthgrades apparently assigned Assured an "average" rating, while Assured's main competitor was assigned a "superior" rating. Block found this objectionable. Block fundamentally disagrees with the proposition that any entity is capable of making "qualitatively relative pronouncements about health care providers," *id.* at ¶13, and claims that information provided with respect to Assured and its local Washington competitors was incomplete. On this basis, Assured initiated a string of letter and telephonic correspondence with Healthgrades in which Assured objected to the content and nature of the information Healthgrades maintains, and suggested that Healthgrades may be incurring liability for defamation under Washington's Consumer Protection Act.

Thereafter, Healthgrades filed a declaratory judgment action in the district court for Jefferson County, Colorado.[1] In addition, Assured filed the instant action in King County Superior Court asserting various tort based causes of action arising, in part, under the Washington Consumer Protection Act. Healthgrades removed the King County action to this court, and now moves to dismiss the instant litigation for lack of personal jurisdiction.

In its motion, Healthgrades argues that it lacks sufficient contacts with Washington to justify jurisdiction in this court. It further argues that any dispute between it and Assured must be litigated in Colorado pursuant to the User Agreement. Assured opposes the motion, claiming that Healthgrades has had sufficient contacts with Washington to support jurisdiction, and disputing the contention that it is bound by the User Agreement. Because the facts underlying those competing positions are not in dispute, the court finds that summary judgment is appropriate.

II. DISCUSSION

A. Standard for Specific Personal Jurisdiction[2]

A federal district court's exercise of specific personal jurisdiction over an out-of-state defendant must comply with the Due Process Clause of the United States Constitution and the long-arm statute of the state in which it

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[1] Assured's motion to dismiss the Colorado action on jurisdiction grounds was granted on May 16, 2001.

[2] There is no contention that general jurisdiction over Healthgrades exists in this case.

sits. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984). Because Washington's long-arm statute permits jurisdiction to the fullest extent allowed by the Due Process Clause, this court's jurisdiction over Healthgrades is determined solely by reference to the latter. *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1405 (9th Cir. 1994).

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)). This Due Process requirement "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.* at 472 (citation omitted). In keeping with these constitutional requirements, this court will have jurisdiction over Healthgrades only if 1) Healthgrades engaged in some act or consummated some transaction with a Washington resident, by which it purposefully availed itself of the privilege of engaging in activities in Washington and invoked the benefits and protections of this state; 2) the claims in the litigation arise out of or are related to Healthgrades' Washington-centered activities; and 3) the exercise of jurisdiction is otherwise reasonable. *Burger King*, 471 U.S. at 472; *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 416 (9th Cir. 1997); *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995).

B. Purposeful Availment

The "purposeful availment" prong of the Ninth Circuit's test for specific personal jurisdiction is met "if the defendant has taken deliberate action within the forum or if he has created continuing obligations to forum residents." *Ballard*, 65 F.3d at 1498. The defendant need not be physically present within the purported forum state, "provided that his efforts 'are purposefully directed' " toward forum residents." *Id.*

Healthgrades argues that its posting of independently collected medical service provider information on the internet does not satisfy this purposeful availment prong. It contends that the simple maintenance of a passive website that does not transact business with visitors, without more, is neither action within the forum nor purposefully directed toward form residents. Assured responds that Healthgrades' website is interactive, thus involving substantial contact with forum residents, and that the information it provides is specifically targeted for dissemination to visitors domiciled in this state. Neither of Assured's contentions withstand scrutiny.

Courts confronting jurisdictional challenges based on the maintenance of internet websites have developed an analytical doctrine in which the sites are placed somewhere along "a broad spectrum of internet use" with interactive websites, on one hand, and passive websites, on the other, representing the spectrum's poles. *See Cybersell*, 130 F.3d at 417-18. Truly passive websites, which are generally accessible and simply post information available to the visitor, without more, do not support the exercise of personal jurisdiction over the passive website's creator. *Id.* at 418. *See also Millennium Enterprises,*

Inc. v. Millennium Music, L.P., 33 F. Supp.2d 907, 915 (D. Or. 1999) (citation omitted). Interactive sites, by contrast, allow the visitor to exchange information with the host and, based on "the level of interactivity and commercial nature of the exchange of information on the Web site," may support an exercise of personal jurisdiction. *Id.* In short, maintenance of a passive website alone will not justify jurisdiction over a foreign defendant, whereas with an interactive website "the likelihood that personal jurisdiction can be constitutionally exercised [over a foreign defendant] is directly proportionate to the nature and quality of the commercial activity that an entity conducts over the internet." *Cybersell*, 130 F.3d at 419 (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)) (internal quotations omitted).

This court has reviewed the information made available on Healthgrades' website, explored the site structure and its peripheral content, and has followed the necessary procedures for accessing Healthgrades' medical provider databases. Based on that first hand experience, the court concludes that there is no merit to Assured's contention that the website at issue is interactive and commercial in nature. Healthgrades' website essentially provides a one way street to access the information it has collected but does not allow the visitor and the host to exchange pertinent information. As the above cited decisions make clear, the absence of any commercial transactions, either proposed or consummated on the site, renders Healthgrades' website essentially passive. Thus, the exercise of personal jurisdiction by this court over Healthgrades, based solely on its creation of its website, is constitutionally impermissible. *Panavision v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (discussing *Cybersell*, and reiterating that personal

jurisdiction over a foreign defendant does not exist when that defendant has no contact with the forum state "other than maintaining a web site accessible to anyone over the internet"). "A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction." *Millennium Enterprises*, 33 F. Supp.2d at 915 (citation omitted).

Alternatively, Assured argues that, even if Healthgrades' website posting does not constitute efforts purposefully directed at Washington residents, the purposeful availment prong may be satisfied under the Ninth Circuit's alternative "effects test." The effects test recently recognized in *Panavision* applies in tort cases and provides that purposeful availment may exist and personal "jurisdiction may attach if the defendant's conduct is aimed at or has an effect in the forum state." *Panavision*, 141 F.3d at 1321. In order to satisfy the effects test for specific personal jurisdiction, there must be 1) an intentional act by defendant; 2) the act must be expressly aimed at the forum state; and 3) the act must cause harm, "the brunt of which is suffered – and which the defendant knows is likely to be suffered – in the forum state." *Id.*

The *Panavision* court was addressing a situation where an Illinois resident knowingly used the California-based plaintiff's registered trademarks as the domain name for websites he established. Upon being notified by the plaintiff that his use of the registered marks for domain names was contrary to the Lanham Act, the defendant in *Panavision* offered to sell his rights in the infringing sites and, the court found, attempted to extort money from the California corporation in exchange for ceasing his infringing use. Under those circumstances, the

court found that the defendant had purposefully directed his extortion attempts at a California corporation that would predictably feel the injury of that extortion in its home state.

The instant case is inherently distinguishable from *Panavision*. The record before the court is devoid of any evidence of an intentional act expressly aimed at a Washington resident. On the contrary, it is undisputed that Healthgrades' site is simply made available to anyone with an internet connection. Unlike the defendant in *Panavision*, Healthgrades did not select a particular entity as a target for its intentional tort (assuming, without deciding, that a tort was committed in this case).

Furthermore, the *Panavision* court recognized that simple commission of a tort by creating an offending website "is not sufficient to subject a party domiciled in one state to jurisdiction in another. . . . As [the court] said in *Cybersell*, there must be 'something more' to demonstrate that the defendant directed his activity toward the forum state." *Id.* at 1322 (finding that "something more" in the defendant's calculated scheme to appropriate registered marks and extort money from a victim in a foreign state). *Panavision* does not advance Assured's position.

The instant case is analogous to the situation confronted in *Cybersell*, in which the defendant conducted no commercial activity on its site, which was essentially a passive home page on the web, and the defendant "did nothing to encourage people in [the plaintiff's forum state] to access its site." *Cybersell*, 130 F.3d at 419. The court found that scenario categorically did not support application of the effects test. *Id.* at 420. As in *Cybersell*, the instant defendant "has consummated no transaction, nor

has it performed any act by which it purposefully availed itself of the privilege of conducting activities [in Washington] thereby invoking the benefits and protections of [Washington] law." *Id.* at 419.

That being the case, Healthgrades' contacts with Washington are insufficient to establish purposeful availment. Because purposeful availment is a prerequisite to the court's exercise of specific personal jurisdiction over Healthgrades, and has not occurred based on the undisputed facts of this case, the court's necessary analysis ends here.

III. CONCLUSION

For the reasons detailed above, the court finds that personal jurisdiction over defendant Healthgrades does not exist based on the undisputed facts of this case.[3] Now, therefore, the court hereby GRANTS Healthgrades' motion to dismiss for lack of jurisdiction.

DATED at Seattle, Washington this 13th day of June, 2001.

/s/ Barbara Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

[3] Given the court's ruling that it lacks jurisdiction over Healthgrades, there is no need to resolve the parties' dispute over application and interpretation of the User Agreement.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHWEST HEALTH-CARE ALLIANCE, INC., a Washington corporation dba Assured Home Health & Hospice, Plaintiff-Appellant, v. HEALTHGRADES.COM, INC., a Delaware corporation, Defendant-Appellee.	NO. 01-35648 D.C. No. CV-01-00488-BJR Western District of Washington, Seattle ORDER (Filed Nov. 15, 2002)

Before: HALL, TASHIMA, and RAWLINSON, Circuit Judges.

The panel has voted to deny appellee's petition for rehearing. Judges Tashima and Rawlinson have voted to deny the petition for rehearing en banc and Judge Hall recommends denial. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc is DENIED.

(2)

Supreme Court, U.S.
FILED
MAR 24 2003
OFFICE OF THE CLERK

No. 02-1250

IN THE

Supreme Court of the United States

HEALTHGRADES.COM, INC.,

Petitioner,

v.

NORTHWEST HEALTHCARE ALLIANCE, INC. d/b/a ASSURED HOME HEALTH & HOSPICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner has quite misleadingly framed its issue. More correctly, the question presented in its Petition is as follows:

> Should this Court review a case in which, in an unpublished opinion, the Ninth Circuit applied the "effects test" set forth in *Calder v. Jones*, 465 U.S. 783, 788-90 (1984), to specific facts and determined that personal jurisdiction could be exercised over Petitioner?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Northwest Healthcare Alliance, Inc. d/b/a Assured Home Health & Hospice, is a wholly-owned subsidiary of Assured Capital Partners, Inc., a Nevada corporation. No publicly held company owns 10% or more of the stock of Assured Capital Partners, Inc.

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STATEMENT OF THE CASE AND CLARIFICATION OF RECORD

Petitioner's Statement of the Case (1) is incomplete, omitting undisputed material facts; (2) misstates Assured's position; and (3) suggests inferences that are misleading and, in fact, irrelevant.

Since the Ninth Circuit's Opinion was not for publication, it did not include a complete exposition of the Record facts [Petition Appendix p. 2]. The undisputed material facts bear repeating.

Petitioner is a corporation with offices in Lakewood, Colorado. Petitioner created and maintains a website at the URL http://www.healthgrades.com. Respondent, Northwest Healthcare Alliance, Inc. d/b/a Assured Home Health & Hospice ("Assured"), is a Washington corporation which provides Medicare-certified home healthcare services in three rural Washington counties. By Washington state law, it is prohibited from providing these services anywhere else.[1]

As its service denomination suggests, Assured's services at issue in this lawsuit are provided to its patient-clients in their homes. It is, therefore, the quintessential local business.

As a Medicare-certified home healthcare agency, Assured is surveyed by Washington State Department of Health surveyors on a routine basis. If the surveyors determine that

1. Washington allocates certain healthcare services under a Certificate of Need program. The Washington State Department of Health has licensed Assured to provide Medicare-certified home healthcare services in Lewis, Thurston and Mason Counties [9th Cir. ER 000009, 204].

a Medicare-certified home healthcare agency is out of compliance with Medicare regulations, a notice of deficiency, indicating the out-of-compliance issue, is given to the home healthcare provider. [9th Cir. ER 000258-59.]

The Washington State Department of Health surveyors use the data generated by the surveys in the state's Medicaid program and provide the federal government's Medicare program with the same information. The data is public information.

Petitioner, in its website, advertises a number of services and provides a variety of information. The portion of its website which is at issue here is a section wherein it purports to provide "comprehensive healthcare ratings to consumers to help them make the most informed decisions regarding their healthcare." [9th Cir. ER 000126.] Since more than 8,000 home health agencies across the United States are rated [9th Cir. ER 000021], a visitor to the Healthgrades website who desires to obtain information about Medicare-certified home healthcare agencies in his or her particular locale must enter a geographic locator, typically a zip code or city [Petition Appendix p. 7]. The visitor will then be given the names of home healthcare agencies providing services within that particular geographic area. If the visitor delves further into the site he or she will be given "rating" information on the agency he or she is investigating [9th Cir. ER 000089-96].

The dispute in this matter relates to the rating or grading of Respondent's Medicare-certified home healthcare agency by Petitioner. Respondent claims that the ratings are defamatory and violate Washington's Consumer Protection Act, RCW 19.86.020, as an unfair or deceptive act or

practice – providing Washington consumers with false or misleading information.[2] Assured's dispute with Petitioner's use of the data is in its effort to rate one home healthcare provider versus another by using data in an inappropriate fashion, not with the data itself. In other words, it is the application of that data to a use for which it was not intended and does not work that is the gravamen of Respondent's complaint.

A key fact, for purposes of evaluating the jurisdictional issues in this matter, is that Petitioner has sorted the information on the Medicare-certified home health agencies on a state-by-state basis [9th Cir. ER 000021-22, 258] using a proprietary algorithm and certain scoring protocols. Petitioner ranked Assured against other Medicare-certified home healthcare agencies only in Washington state. In essence, the ranking was based on the number of deficiencies reported in the last survey period and over a preceding period of time. There was no effort to evaluate the deficiencies' severity [9th Cir. ER 000258-260]. Each Medicare-certified home healthcare agency in Washington state was then rated above average, average, or below average, in comparison with other Washington state agencies, depending essentially on the number of deficiencies reported by the Washington State Department of Health surveyors.

As the Ninth Circuit observed, Petitioner was well aware that its ratings of Washington Medicare-certified home healthcare providers would be of value primarily to Washington consumers since local home health services

2. RCW 19.86.020 is Washington State's version of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 5.

were what would be sought on the website [Petition Appendix pp. 4-5]. It observed that the data was initially obtained from Washington State sources and the alleged defamation concerned the Washington activities of a Washington resident. Finally, as the Ninth Circuit observed, the brunt of harm suffered by Assured would be suffered where Respondent is incorporated and where it has its principal place of business and where its reputation is likely to have been injured [Petition Appendix p. 5].

These key facts are either not included in Petitioner's Statement of the Case or are recast in a misleading manner. For instance, Petitioner asserts that its ratings are based on data from the federal government [Petition p. 3], neglecting to inform the Court that the data is collected in the first instance by Washington State Department of Health surveyors.

Petitioner also includes a paragraph referring to a "user agreement" stating that actions to enforce the agreement must be brought in the courts of Colorado [Petition p. 3]. Petitioner fails to inform the Court that it brought an action in state court in Colorado against Assured to force Assured to litigate this matter in state court in Colorado. The Colorado trial court dismissed Petitioner's complaint. Petitioner appealed to the Colorado Court of Appeals, which upheld the decision of the trial court in a not-for-publication opinion *Healthgrades, Inc. v. Northwest Healthcare Alliance, Inc. d/b/a Assured Home Health & Hospice*, 2002 WL 1839278 (Colo. App.).

Finally, Petitioner asserts that Assured contends that any effort to rate home healthcare providers according to government data is improper [Petition p. 3]. This is an incorrect statement. Respondent asserts only that the data

being collected by Washington State Department of Health surveyors at the time this suit was initiated is inappropriate for the grading which Petitioner has done. [9th Cir. ER 000207-208.]

REASONS FOR DENYING THE PETITION

I. PETITIONER HAS NOT ARTICULATED ANY REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT

"A Petition for a Writ of Certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Petitioner urges this Court consider this issue as a "crucial constitutional question." [Petition p. 5]. Petitioner ignores the fact that this Court has already provided in *Calder v. Jones*, 465 U.S. 783 (1984), the jurisdictional test that the Ninth Circuit must follow and did follow. Indeed, Petitioner cites approvingly the very language of *Calder* which is relevant in this matter [Petition p. 6].

Obviously, Petitioner does not advocate overruling or modifying *Calder*. Petitioner is simply unhappy that the Ninth Circuit correctly applied *Calder* to the undisputed facts below.

Petitioner claims there is a split of authority between the Ninth Circuit and other Courts of Appeal; this claim is, in fact, incorrect. Courts have come to different conclusions on the issue of personal jurisdiction simply because the facts are different in different cases.

And, finally, Petitioner ignores the fact that the Ninth Circuit's ruling has virtually no precedential value since it was a not-for-publication opinion. This is hardly a compelling reason for review.

The Ninth Circuit applied the appropriate standard, i.e., the *Calder* test. Consequently, review of this case would not establish new law. Thus, there is no compelling reason for this Court to review the Ninth Circuit's opinion.

II. THE NINTH CIRCUIT CORRECTLY APPLIED *CALDER* TO THE FACTS BELOW

The Petitioner incorrectly argues that the Ninth Circuit "rejected the minimum contacts analysis of *Zippo Mfg. Co. v. Zippo.com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)." [Petition p. 5.] In fact, the Ninth Circuit's opinion confirms that the Ninth Circuit has, thus far, endorsed two tests for determining whether an out-of-state Internet website operator's activities amount to purposeful availment of the forum state in the context of personal jurisdiction: the *Zippo* "sliding scale" test and the *Calder* "effects" test. [Petition Appendix pp. 3-4]. As the Ninth Circuit correctly pointed out, the *Calder* "effects test" is employed where the claimed harm sounds in tort [Petition Appendix p. 4].

Because the Respondent's claims sound in tort, the Ninth Circuit correctly applied *Calder* and found a basis for personal jurisdiction on the following grounds: Petitioner had intentionally gathered information on Respondent and other Washington state Medicare-certified home healthcare agencies; that information was developed by Washington State Department of Health surveyors; the so-called "rating" which Healthgrades undertook was a comparison of Washington state Medicare-certified home healthcare agencies against each other; the most likely users of the ratings that affect Respondent are Washington state consumers; the alleged defamation concerned the Washington activities of a Washington resident; and that the damages, if any, or the brunt of the harm suffered by Respondent

occurred in Washington state where Respondent is incorporated, has its principal place of business, and where its reputation is likely to be injured [Petition Appendix pp. 4-5].

III. THERE IS NO SPLIT OF AUTHORITY AMONG THE CIRCUITS

The cases cited by Petitioner do not demonstrate a split of authority among the circuits. Rather, they confirm that the circuits cited, in cases where the claims are tort-based, have applied the *Calder* test to their specific facts. The outcomes have depended on the facts of the particular cases. *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002), was an Internet defamation case involving a claimed cover-up and conspiracy involving the plaintiff who was then Associate Deputy Director of the FBI. The Fifth Circuit took issue with the notion that defendant must have known that the harm of the article would have its effect in Texas where the plaintiff resided. It observed that the article was not expressly aimed at Texas. Indeed, there was no reference to Texas or the Texas activities of the plaintiff. Texas was not the focal point of the article or the harm suffered.

In *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir. 1994), *cert. den.*, 513 U.S. 962 (1994), a world-class runner who resided in Ohio took exception to a drug test which was administered in Monaco where the race was held. The laboratory which did the analysis was located in Paris. The defendant was not a U.S. resident and had no U.S. office. The plaintiff's claims included breach of contract, defamation and tortious interference with business expectancy. With respect to the tort claims, the Sixth Circuit applied the *Calder* test and noted the following facts in rejecting personal jurisdiction by the

Ohio courts: The alleged tortious activities took place in Monaco and Paris; the plaintiff was an international world-class athlete whose reputation was not centered in Ohio; defendant did not disseminate any of the allegedly defamatory materials in Ohio – Ohio periodicals simply picked up the story; Ohio was not the focal point of the press releases.

Remick v. Manfredy, 238 F.3d 248 (3rd Cir. 2001), involved as one claim, misrepresentation of plaintiff's image through an Internet posting where there was no specific aiming at the forum state. Personal jurisdiction was denied using the *Calder* test. Similarly, *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), involved a suit brought in Virginia by a Virginia prison warden claiming defamation in articles printed in local Connecticut newspapers which were also posted on the Internet. In rejecting Virginia jurisdiction, the Fourth Circuit pointed out that the two newspaper websites were designed to serve their local Connecticut readers and not to attract a Virginia audience. The Court also pointed out that the focus of the article was on the Connecticut state prisoner transfer policy and not on the Virginia warden.

ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707 (4th Cir. 2002), involved a tenuous copyright infringement claim against an Internet service provider for enabling infringement by one of its subscribers. The Court found no activities of defendant directed at the forum state and rejected personal jurisdiction.

Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2nd Cir. 1997), is likewise inapposite. It involved a trademark infringement claim against a Missouri nightclub's use of an Internet website using its name which was also the name of

a New York nightclub. Not only did the outcome of that case revolve around the peculiarities of New York's Long-Arm Statute, CPLR §§ 302(a)(2) and (a)(3), which is more restrictive than Washington's, but there the website was clearly aimed at patrons who might frequent the Missouri nightclub and was not targeting New York residents. In that respect, the case is quite similar to the *Young* case.

In short, Petitioner has simply cited a few cases which have found a lack of jurisdiction using the *Calder* analysis. In none of the cases, however, is the factual nexus with the forum state anywhere close to the nexus which the Ninth Circuit correctly observed in this case.

IV. PETITIONER HAS COMPLETELY MISCONSTRUED THE "SLIDING SCALE" TEST

Petitioner suggests that if the Ninth Circuit applied the "sliding scale test" which was endorsed in *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997), the result would be different, or that the *Calder* effects test is not appropriate as an analytical tool in this case. Neither suggestion is accurate or warranted. As the Fifth Circuit observed in the *Revell* case, *supra*, the *Zippo* "sliding scale" test is not in tension with the effects test of *Calder*. 317 F.3d at 471-72. The Ninth Circuit did not "reject" the "sliding scale" analysis; it simply found the effects test of *Calder* to be appropriate for analyzing the tort-based claims in this case. Using either test, there is more than enough nexus with Washington state beyond merely publishing a general purpose website. Thus, this argument, too, raises no compelling reason for this Court to review this matter.

CONCLUSION

Because Petitioner has not presented any compelling reason for this Court to exercise discretionary jurisdiction over the Ninth Circuit's ruling, the Petition should be denied.

Respectfully submitted,

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